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In The

SUPREME COURT OF THE UNITED STATES

Fall Term 1964

No. [redacted] 196

PAUL H. WOFFORD, et al,
Petitioners,

vs.

THE NORTH CAROLINA STATE HIGHWAY COMMISSION,
Respondent.

PETITION TO THE UNITED STATES SUPREME COURT FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

To the Honorable, the Chief Justice and the Associate Justices of the United States of America:

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No.

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vs.

THE NORTH CAROLINA STATE HIGHWAY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

To the Honorable, the Chief Justice and the Associate Justices of the United States of America:

The petition of Paul H. Wofford and wife, Lucille Paschal Wofford, Fred M. Parrish and wife, Mary Anne Paschal Parrish, and Hensel Wood Products for a writ of certiorari to review a judgment of the Supreme Court

of North Carolina made and entered by said court on the 25th day of February, 1965, a copy of which is hereto appended, and respectfully shows to this Honorable Court:

1. JURISDICTION.

This appeal and petition for writ of certiorari is from the opinion and judgment rendered by the North Carolina Supreme Court affirming a judgment of the Superior Court of Forsyth County, North Carolina. The opinion of the Supreme Court of North Carolina has been reported. See *Wofford* v. *North Carolina State Highway Commission*, 263 N. C. 677, 140 S.E. 2d 376 (1965). A copy of the opinion rendered by said court is annexed to this petition as Appendix I. A copy of the judgment of the Superior Court, from which petitioner appealed, is annexed as Appendix II.

2. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this court is invoked on the grounds that the defendant, The North Carolina State Highway Commission, has appropriated and damaged petitioners' private property for public highway purposes without payment of just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In this instance, the North Carolina State Court has decided a federal question of substance not theretofore determined by this court and has decided in a way not in accord with applicable decisions of this court and other federal courts.

The North Carolina Supreme Court has rendered a decision in conflict with the overwhelming majority of decisions of other state courts of appeals on the same matter

and has decided an important federal constitutional question in conflict with the Fifth and Fourteenth Amendments to the United States Constitution.

The basis upon which the North Carolina Supreme Court rested its decision is particularly applicable to the condemnation of property for controlled access highways. Both Federal and State Governments are in the process of constructing limited access highways throughout the United States. It would, therefore, be desirable for this court to pass on this important question so that there would be a uniform precedent to follow in all of the states of the United States when faced with the particular problem presented in this case, so that all persons may have equal protection of the law. The opinion of the North Carolina Supreme Court has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision in order that petitioner's property may not be taken without due process of law and without the payment of just compensation.

(a) The date of the judgment and decree sought to be reviewed is the judgment and opinion of the Superior Court of Forsyth County, North Carolina, dated September 3, 1964 and entered on the same day. The judgment and opinion of the Supreme Court of North Carolina affirming the judgment of the lower court sought to be reviewed is February 24, 1965 and entered on that day.

(b) The statutory provisions believed to confer jurisdiction on the United States Supreme Court to review the judgment entered by the North Carolina Supreme Court are U. S. C. A. Title 28, Sec. 1257(3).

(c) A petition to rehear was filed with the Supreme Court on March 29 and denied on April 5, 1965.

3. QUESTIONS PRESENTED FOR REVIEW AND RAISED BY THIS PETITION.

(a) May the State of North Carolina through its agency, The North Carolina State Highway Commission, appropriate for highway purposes petitioners' private easement of ingress and egress without the payment of just compensation?

(b) Is the taking of petitioners' private easement of ingress and egress a taking of property within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution for which compensation must be paid?

(c) Under State law where lots are sold and conveyed by reference to a plat or map which represents a division of land into subdivisions of streets and lots and the purchaser of the lot therein acquires a private right and easement to have all and each of the streets kept open, and the lot owner has access to his lot from both directions on the abutting street, can the State of North Carolina close the street at one end, creating a *cul de sac,* without the payment of just compensation for the easement of access taken from the petitioners?

(d) Where the purchaser of a lot has purchased land which is a subdivision of a tract of land into lots and streets and under state law has thereby acquired the right to have each and all of the streets in said subdivision kept open, the right being at least contractual, does not the decision of

the state court in this particular case impair the obligation of contracts in violation of Article I, Section 10, of the United States Constitution?

4. THE UNITED STATES CONSTITUTIONAL PROVISIONS WHICH ARE INVOLVED IN THIS CASE ARE:

(a) *U.S.C.A. Constitutional Amendment 5,* page 297:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

(b) *U.S.C.A. Constitutional Amendment 14, Sec. 1,* page 4:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(c) *U.S.C.A. Constitution, Article I, Section 10,* page 3:

"No state shall . . . pass any law impairing the obligation of contracts."

5. STATEMENT OF THE CASE.

On December 18, 1963, the petitioners filed a complaint in the Superior Court of Forsyth County, North Carolina, against the defendant, The North Carolina State Highway Commission, asking for the payment of damages resulting from the appropriation of their private easement of ingress and egress by the North Carolina Highway Commission for highway purposes. The defendant, State Highway Commission, filed an answer denying the material allegations in the complaint. Prior to the hearing, the facts of this case were stipulated and agreed upon by all parties as follows:

Individual plaintiffs own an 8.1 acre tract of land in the City of Winston-Salem, a portion of which they leased to corporate plaintiff. The property is in an industrial zone, and corporate plaintiff operates a wood processing plant thereon. The land lies to the south of and abuts 21st Street, a public street, which intersects Ivy Avenue a short distance to the west of the property, and prior to May 1963 intersected Liberty Street about 200 feet to the east of the property. Prior to May 1963, a large percentage of all traffic going to and from plaintiffs' property was by way of the Liberty Street intersection. Liberty Street is one

of the main arteries of travel in the City of Winston-Salem and prior to May 1963 was the main street connecting 21st Street to the business and residential areas to the north, east and south of plaintiffs' property, and to the general system of streets and highways in the City of Winston-Salem. In May 1963, the defendant, State Highway Commission, began construction of highway project 8.17378, which is commonly called the North-South Expressway through the City of Winston-Salem, and is designated U. S. Highway 52. The Expressway crosses 21st Street between plaintiff's property and Liberty Street. Defendant caused 21st Street to be "blocked, cut off and closed" from Liberty Street by a dirt fill made in the course of construction of the Expressway. Thus, 21st Street is blocked and terminated about 100 feet east of plaintiffs' property, creating a *cul de sac*. The closest access from plaintiffs' property to Liberty Street is now by way of 21st Street, Ivy Avenue and 25th Street. The intersection of 25th and Liberty Streets is four blocks north of 21st Street.

In addition to the facts set forth above, *it was stipulated that plaintiffs, as the owners of the lands described above abutting on 21st Street, prior to the taking by the defendant, State Highway Commission, had both public and private easements of ingress nd egress over 21st Street in both directions, including private easement of ingress and egress over 21st Street into Liberty Street on the east.* Petitioners contend that the land on 21st Street was part of a tract of land which was subdivided by the owner into streets and lots, a map of the subdivision was made and recorded, lots (including petitioners') were sold with respect to the map, and 21st Street is shown on the map. This is shown by the exhibits filed in the case. These contentions by the petitioners were taken as true by the

North Carolina Supreme Court (see the opinion attached hereto). It was further stipulated and agreed that by reason of the facts set forth above, the petitioners' property was substantially damaged by reason of the actions of the defendant, State Highway Commission, in blocking access from 21st Street into Liberty Street approximately 100 feet north of petitioners' property by reason of the construction of State Highway project 8.17378, Forsyth County. No notice was given to petitioners and no hearing was had with reference to the closing of the street prior to the institution of this suit.

The trial court ruled that the blocking of 21st Street under the facts as hereinabove set forth did not constitute an appropriation of petitioners' property or an interest in petitioners' property, and that petitioners suffered no compensable damage by reason of the appropriation by the State of their private easement of access into Liberty Street.

6. STAGE OF THE PROCEEDINGS IN THE COURT OF FIRST INSTANCE AND IN THE APPELLATE COURT AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

The federal question sought to be reviewed, i.e., the taking of petitioners' private easement, without compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, was raised in the complaint, which was the initial pleading filed in this matter on December 18, 1963. After rendition of the judgment, motions were made to set aside the judgment as being contrary to the greater weight of the evidence and contrary

to the laws of the State of North Carolina and of the United States. The same federal question was presented in the assignments of error to the North Carolina Supreme Court and were carried forward in the record on appeal to the North Carolina Supreme Court. These assignments of error were carried forward in the appellate brief filed with the North Carolina Supreme Court and argument was made that the taking of petitioners' private easement was a taking of property within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution. The petitioners raised these federal questions in their initial pleadings and have continued to raise them at each stage of the proceeding, including the court of last resort in the State of North Carolina.

The question relating to impairment of the obligation of contracts was first presented in the Petition to Rehear. It was unnecessary to raise the question prior to this time because of the previous rulings of the state court as more fully set forth in the argument.

7. ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

Petitioner respectfully shows to the court that this is a case of great importance not only to the petitioner but throughout the United States. It was stipulated by all parties that petitioners had property abutting on 21st Street, said property lying between Liberty Street on the east and Ivy Avenue on the west in the City of Winston-Salem, North Carolina, and that petitioners had a *private easement* of ingress and egress in both directions; that Liberty Street on the east was and is the main street leading

to the general system of streets in the City of Winston-Salem, North Carolina, and that the defendant has appropriated petitioners' private easement into Liberty Street by the construction of the North-South Expressway, a limited access highway.

The question then resolves itself to this: Is the taking and appropriation of the petitioners' private easement of access by the North Carolina State Highway Commission under the facts of this case a taking of private property requiring payment of just compensation, as required by the United States Constitution?

By reason of the stipulations entered in this case, the problem seems limited to whether or not a private easement can be defined as property. If so, there has been a taking.

An easement has been universally defined as property. This is the North Carolina definition, *Hedrick* v. *Graham,* 245 N. C. 249, 86 S.E. 2d 129 (1957), as well as that of the United States Supreme Court, *United States* v. *Welch,* 217 U. S. 333, 54 L. Ed. 787 (1910).

An easement or servitude, whether in the nature of a right of way, a restrictive covenant, or a negative or equitable easement, is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured. 29A C.J.S., *Eminent Domain,* (1965) § 105(1), page 452; *United States* v. *Welch,* 217 U. S. 333, 54 L. Ed., 787 (1910); *Brooklyn Dist. Terminal* v. *City of New York,* 139 F. 2d 1007 (1944); *U. S.* v. *Gossler,* 60 F. Supp. 971 (1945); *U. S.* v. *Certain Lands,* 49 F. Supp. 265 (1943).

U. S. v. *11.06 Acres of Land,* 89 F. Supp. 852 (1950); *Tenny Tel. Co.* v. *United States,* 82 F. 2d 788 (1936); 2 Nichols, *Eminent Domain,* § 5.72, page 105 (Third Ed.); *Hedrick* v. *Graham,* 245 N. C. 249, 96 S.E. 2d 129 (1959).

The owner of land abutting on a street or highway has a private right in such street, distinct from that of the public, which cannot be taken nor materially interefered with without just compensation, and this is so even though another owns the fee in the highway. 29A C.J.S. *Eminent Domain,* § 105(1) (1965); 2 Nichols, *Eminent Domain,* § 5.72(1) (3rd Ed.); *Schiefelbein* v. *United States,* 124 F. 2d 945 (1945); *Chicago* v. *Baker,* 98 Fed. 830 (1900); 1 Lewis, *Eminent Domain,* Secs. 121 and 198 (3rd Ed.).

See also outstanding article on this subject entitled *Measure of compensation for extinguishment of easements by condemnation* (1945) Wisconsin Law Review, page 5.

It has therefore been held by the overwhelming majority of courts that where, by the vacation or closing of a street, access to his property from the general system of streets in that direction is cut off and the property is left on a *cul de sac,* the property owner is entitled to damages and payment thereof is required by the Fourteenth Amendment to the United States Constitution, notwithstanding that he has access from another direction.

Anno. 49 A.L.R. 330, 351. *Right of owner of property not abutting on closed section to compensation for vacation of street:* Supp. 93 A.L.R. 639; *Bacich* v. *Board of Control of California,* 144 P. 2d 818 (1943); *Hughes* v. *State,* 328 P. 2d 397 (Idaho 1958); *Breident* v. *Southern Pacific*

Co., 34 Cal. Rep. 237 (Calif. 1963); *Highway Commission* v. *Flemming*, 157 So. 2d 792 (Miss. 1963); *Tall Timbers Corp.* v. *Anderson*, 370 S.W. 2d 214 (Texas 1963); *Coy* v. *City of Tulsa*, 2 F. Supp. 411 (1933). This was formerly the position taken by the North Carolina Supreme Court. *Hiatt* v. *Greensboro*, 201 N. C. 515, 160 S.E. 748 (1931); *Martin* v. *United States*, 220 F. 2d 65 (1959).

Therefore, petitioners have a private right of easement by reason of being an abutter on 21st Street, which is an easement in both directions to the next intersecting block, and the taking of this private easement of access under the facts presented in this case is a taking of private property within the meaning of the United States Constitution for which payment of just compensation is required. 39 C.J.S., *Highways*, Sec. 143, page 1085; 49 A.L.R. 330, 351; 93 A.L.R. 639, 642; *Sanders* v. *Smithfield*, 221 N. C. 166, 19 S.E. 2d 630 (1942). Anno. 150 A.L.R. 644.

Petitioners' case, however, involves considerably more than an abutters' easement. Petitioners have a private easement by reason of having purchased property which was platted with 21st Street being shown thereon, which is in the nature of a covenant or restriction running with land. North Carolina law is that where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to public use, and the purchaser of the lot or lots acquires the right to have all and each of the streets kept open. *Insurance Co.* v. *Carolina Beach*, 216 N. C. 778, 7 S.E. 2d 13 (1940); *Evans* v. *Horne*, 226 N. C. 581, 39 S.E. 2d 612 (1946); *Conrad* v. *Land Com-*

pany, 126 N. C. 776, 36 S.E. 282 (1900); *Realty Co.* v. *Hobbs,* 261 N. C. 414, 135 S.E. 2d 30 (1963); *Moose* v. *Carson,* 104 N. C. 431, 10 S.E. 689 (1889). This easement may not be extinguished except by agreement or estoppel, and this is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lot. *Realty Co.* v. *Hobbs, supra; Threedy* v. *Brennan,* 131 F. 2d 488 (1942); *Gormley* v. *Clark,* 134 U. S. 338, (1890).

Therefore, where land is conveyed by deed to property which is part of a map or plat upon which streets and ways are marked out, the purchaser acquires an easement to use such streets and ways, which cannot be taken from him without just compensation; and the use of the streets or ways by public authority in such a manner as to deprive the purchaser of the enjoyment of his easement is a taking of property within the Fourteenth Amendment to the United States Constitution. *Panhandle Co.* v. *State Highway Commission,* 294 U. S. 613, 79 L. Ed. 1090 (1935); *Tucker* v. *U. S.,* 283 Fed. 428 (1922); *United States* v. *Certain Lands,* 112 Fed. 622 (1899); *United States* v. *Certain Lands,* 140 Fed. 463 (1905); *United States* v. *Certain Lands,* 49 F. Supp. 265 (1943); *U. S.* v. *11.06 Acres of Land in St. Louis,* 89 F. Supp. 852 (1950); *Hughes* v. *City of Cincinnati,* 195 N.E. 2d 552 (Ohio 1964); 2 Nichols, *Eminent Domain,* (3rd Ed.) Sec. 5.72(2), page 117 (1963), Anno. 150 A.L.R. 644 (1944); *Appropriation of easement for highway purposes,* 190 N.E. 2d 65 (Ohio 1963). *Minner* v. *City of Lynchburg,* 129 S.E. 2d 673, (Va. 1963). *Hughes* v. *States,* 328 P. 2d 397 (Wash. 1958). *Valenta* v. *Los Angeles,* 394 P. 2d 719 (Cal. 1964).

The only case cited by the North Carolina Supreme Court in the attached opinion supporting its position that where as against the State an abutting landowner in a subdivision has no right to keep the abutting street open to the next intersecting street is *Re Joiner Street,* 164 N.Y.S. 272 (N.Y. 1917). The decisions in New York are in conflict. In *Jablewsky* v. *State,* 38 N.Y.S. 2d 679 (N.Y. 1942), the New York court clearly held that where it appears that lots are sold by grantor giving deeds to lots bounded by a street in a subdivision, he thereby dedicates the street to both public and private use and private rights cannot be taken without compensation. The court then held that where the City of New York closed a public street, cutting off access to abutting land in one direction, the abutting landowner was entitled to compensation. In accord, *State* v. *Single,* 59 N.Y.S. 2d 536, aff. 68 N.Y.S. 2d 745, aff. 76 N.E. 2d 326 (N.Y. 1946).

The case of *Meyer* v. *Richmond,* 172 U.S. 82, (1898), cited by the North Carolina court in the attached opinion resembles the present case only with respect to *how* the street was closed. It clearly appears from that opinion that no private easements of access were involved. The case, therefore, is not in point.

The general rule of law applicable throughout the United States with respect to the creation of a *cul de sac,* where formerly there was access in both directions, is that in order for a landowner to recover damages for the closing of a portion of a street, he must show that he has suffered an injury different in kind from that suffered by the general public. That is, he must show that land has been taken or physically damaged, *or that some easement or right appur-*

tenant to the land has been taken or interfered with. Snow v. *Highway Commission,* 262 N. C. 169, 136 S.E. 2d 678 (1964); *In Re Hull,* 204 N.W. 534 (Minn. 1952); *Taft County* v. *Smith,* 131 S.E. 2d 527 (Ga. 1963). Where no private easements or property rights are involved, the principal applied is that an abutting landowner is not entitled to compensation because of circuity of travel to and from his property; such inconvenience is held to be no different in kind but merely in degree from that sustained by the general public, and is *damnum absque injuria. Nick* v. *Highway Commission,* 109 N.W. 2d 71 (Wisc. 1961); *Taft County* v. *Smith,* 131 S.E. 2d 527 (Ga. 1963).

United States v. *Welch, supra,* discusses cases similar to *Meyer* v. *Richmond, supra,* and distinguishes those cases from ones where a taking of a private easement is involved.

Reichelderfer v. *Quinn,* 287 U. S. 315, 77 L. Ed. 331 (1932) involved a case where this court applied *damnum absque injuria.*

The Court said:

> "It has often been decided that when lands are acquired by a governmental body in fee and dedicated by statute to park purposes, it is within the legislative power to change the use. The abutting owner cannot complain; the damage suffered by him, though greater in degree than that of the rest of the public is no different in kind."

In the footnotes, the Court carefully distinguishes the cases in which private rights are involved as follows:

> "A different question is presented in the cases relied on by the Court below which indicate that a dedication

of land to the public, *by an individual or a conveyance* to a municipality is subject to a condition or imposes a trust that the use be continued. There, rights in the land or against the municipality were said to have been reserved in the grantor or *created in the owners of neighboring lands by the terms of the grant.*" (Emphasis added.)

Damnum absque injuria is the theory applied by the North Carolina Court in the present case, and is only applicable where no private easements or property rights are involved. If petitioners had no rights other than those possessed by the general public in 21st Street, they would not be entitled to compensation. But this is not the case. *It was stipulated in the present case that petitioners had a private easement of ingress and egress from 21st Street to Liberty Street.* Petitioners' case, then, falls within the rule that where a property owner suffers injury different *in kind* from the general public, he is entitled to be compensated. In this case, the injury different in kind is the appropriation of petitioners' private easement into Liberty Street.

The valuation of an easement upon the basis of its destructive impact upon other uses of the dominant estate is the accepted method of determining its worth. *United States* v. *Welch,* 217 U. S. 333, 54 L.Ed. 787 (1910).

Where only one way of access to property exists and that way is blocked or appropriated by public authority, all cases hold that there is a taking of property. *United States* v. *Welch,* 217 U. S. 333, 54 L. Ed. 787 (1910); *Schiefelbein* v. *United States,* 124 F. 2d 945 (1942); *Creasy* v. *Stevens,* 160 F. Supp. 404 (1958). The fact that petitioners

had two private easements of access, one in each direction, to the next intersecting block, and only one of them was appropriated and taken by defendant is no less a taking. The fact that petitioners still have access in one direction goes to the quantum of damages rather than to whether or not there was in fact a constitutional taking of the easement that was appropriated. *City of Rock Hill* v. *Cothran,* 40 S.E. 2d 239 (S.C. 1947).

The courts, of course, have placed a reasonable limitation on the *cul de sac* principle. The extent and limitation of the principle is that if, by the vacation or closing of a street, access to property from the general system of streets in that direction is cut off and the property owner is left fronting on a *cul de sac,* the owner may recover damages, but damages cannot be recovered by a property owner for the vacation or closing of a street in another block from that in which his property is located, or, in other words, beyond the next cross street, since his right of easement extends only to the next intersecting block. 49 A.L.R. 361, 93 A.L.R. 644; *Sanders* v. *Smithfield,* 221 N. C. 166, 19 S.E. 2d 630 (1942); *Bacick* v. *Board of Control of California,* 144 P. 2d 218 (Calif. 1943).

The statement by the North Carolina court that "It has authority to declare that an abutting owner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement" is without substance when applied to the present case, since it was stipulated that petitioners had a private easement of ingress and egress over 21st Street from its property to the intersection of Liberty Street. The cases cited as

authority by the North Carolina court in support of its opinion are cases where it appeared there were no private easements similar to those in the present case.

In *Ins. Co.* v. *Carolina Beach,* 216 N. C. 778, 7 S.E. 2d 13 (1940), the North Carolina court said:

> ". . . to have deprived those who purchased lots with reference to the original map, and those claiming under them, of appurtenant rights, in and to the streets, for the purpose of vesting such rights in another merely for private use would run counter to the provisions of the Constitution of North Carolina, Article I, Section 17, and to the Fourteenth Amendment to the Constitution of the United States."

If these rights cannot be invaded for private use, then certainly they cannot be taken for public use without the payment of just compensation. *Lang* v. *Smith,* 173 At. 682 (Pa. 1934).

Certainly, a private easement should have the same standing as a restrictive covenant. It is clear that a restrictive covenant is a property right, the invasion of which requires the payment of just compensation. *Chapman* v. *Sheridan-Wyoming Coal Co.,* 338 U. S. 621, 94 L. Ed. 393 (1950). *Water Company* v. *United States,* 278 F. 2d 849 (1960). *City of Raleigh* v. *Edwards,* 235 N. C. 671, 71 S.E. 2d 396 (1952). *U. S.* v. *Certain Land in Augusta,* 220 F. Supp. 693 (1963).

Petitioners' right to keep the streets open by reason of buying property located in a subdivision as against private individuals is conceded by the North Carolina court in

the attached opinion. It is a right which cannot be terminated except by agreement. *Realty Co.* v. *Hobbs,* 261 N. C. 414, 135 S.E. 2d 30 (1963).

The right of access to Liberty Street under the facts of this case is at least a contractual right in the nature of property the destruction of which by a condemning authority requires payment of compensation. *Water Company* v. *United States,* 278 F. 2d 842 (1960). *United States* v. *Puget Sound Power and Light Co.,* 147 F. 2d 953 (1944). *United States* v. *4.105 Acres of Land,* 68 F. Supp. 279 (1946). *Lang* v. *Smith,* 173 At. 682 (Pa. 1934).

The opinion of the North Carolina court refers to the following two North Carolina General Statutes, G. S. 136-96 and G. S. 153-9(17). G. S. 136-96 provides for the withdrawal of a street from dedication by the dedicator if it has not been opened and used for more than 15 years after the dedication thereof. This statute has no application to this case, because 21st Street was open and was being used as a public street.

Even if unopened for the statutory period, a street cannot be closed under this statute over the objection of a property owner in a subdivision without a trial by jury on appropriate issues.

In *Evans* v. *Horne,* 226 N. C. 581, 39 S.E. 2d 612 (1946), plaintiffs, landowners, sought to restrain the defendants from closing a street. The plaintiffs' lot was in a subdivision contiguous to two streets. The case was submitted to the jury as required by the statute and the jury found that the continued use of the street was necessary to afford convenient ingress and egress to the lot. Defendants appealed and the judgment was affirmed. The Court said:

". . . so far as she, as purchaser, is concerned, the dedication of an alleyway was complete. . . : In such case, an irrebuttable presumption of law arose that she has suffered peculiar loss and injury."

G. S. 153-9(17) (see Appendix III for statute) provides the method of vacating streets by counties and municipalities. A municipality may close a street provided proper notice is given to property owners on the street, a public hearing held, and a finding by the legislative body of the municipality that no person in the vicinity of said street or road will be deprived of reasonable means of ingress and egress to his property. Even then, this statute provides for appeal to the superior court by any aggrieved person and trial *de novo* by a jury. If the issues with respect to denial of reasonable access are answered against the city, the street cannot be closed under the statute.

The city is not involved in this case. Even if it were, it would make little difference. No notice was given, no hearing had, and petitioners were given no opportunity to be heard. Even if a municipality vacates a street, it surrenders only its public easement and its action cannot have the effect of foreclosing private rights without compensation. *Blowing Rock* v. *Gregorie,* 243 N. C. 364, 90 S.E. 2d 898; *Insurance Co.* v. *Carolina Beach,* 216 N. C. 778, 7 S.E. 2d 13; *Steadman* v. *Pinetops,* 251 N. C. 509, 112 S.E. 2d 102; Anno. 150 A.L.R. 644.

In the end, the North Carolina court rests its decision on the grounds that "The North Carolina General Assembly has found, determined and declared that controlled-access highways are necessary for the preservation of the public

peace, health and welfare; the improvement and development of transportation facilities in the State; the elimination of hazards at grade intersections, and other related purposes. North Carolina General Statutes 136-89.53," and that the State when proceeding under this statute is proceeding within its police power, and therefore, even if there is an appropriation of a private easement, there is no taking within the meaning of the North Carolina or United States Constitution.

In 1 Nichols, *Eminent Domain,* § 1.42(1), the writer states the rule as follows:

> ". . . it is universally conceded that when land or other property is actually taken from the owner and put to use by the public authorities, the constitutional obligation to make just compensation arises, however much the use to which the property is put may enhance the public health morals or safety."

In accord, *Moose* v. *Carson,* 104 N. C. 431, 10 S.E. 689 (1889); *Staton* v. *Railroad,* 111 N. C. 278, 16 S.E. 181 (1892); *Railroad* v. *Williamson,* 136 U. S. 121, 34 L. Ed. 355 (1889); *Chicago B & Q Railroad Co.* v. *Chicago,* 166 U. S. 226, 41 L. Ed. 979 (1897).

The right of a municipality or the state to regulate the use of the streets is not disputed. Therefore, it is within the police power to declare streets one way under proper circumstances, to regulate parking, to construct medians and other proper regulations. In this case, the acts of defendant are not regulation but blocking a street for a use completely inconsistent with street purposes resulting in the destruction of petitioners' private easement.

It is clear that the facts presented by this case disclose that petitioners have had their property taken without compensation as required by the Fourteenth Amendment to the United States Constitution. Due process of law requires that the issues here raised be submitted to a jury for a proper determination of plaintiffs' damage.

THE DECISION OF THE NORTH CAROLINA COURT IMPAIRS THE OBLIGATIONS OF CONTRACTS WHEN APPLIED TO THE FACTS OF THIS CASE IN VIOLATION OF ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION.

In the case of *Hiatt* v. *City of Greensboro,* 201 N. C. 515, 160 S.E. 2d 748 (1931), the North Carolina court held there was a taking of property requiring compensation under an identical factual situation with the present case. The *Hiatt* case was the law of North Carolina until overruled by the court's present opinion. *Martin* v. *United States,* 220 Fed. 2d 65 (1959). The law of North Carolina is that when one purchases a lot in a subdivision he acquires the right to keep each of the streets open. This right is an easement appurtenant to the land. (See previous citations.) It is at least a contractual obligation between the dedicator of the streets and the purchaser of the lot, and the North Carolina cases were unequivocal, prior to the present decision, in holding that the use of land for a public purpose which inflicts injury upon adjacent land such as would have been actionable if caused by a private owner was a taking within the meaning of the State and Federal constitution and could not be authorized by the legislature or any polit-

ical subdivision. *Moose* v. *Carson,* 104 N. C. 431, 10 S.E. 689 (1889); *Staton* v. *Railroad,* 111 N. C. 278, 16 S.E. 181.

The petitioners had a right to rely upon the clear and unequivocal holdings of the North Carolina court when purchasing their property that their rights of easement would be protected.

The North Carolina court rests its decision in the present case on the grounds that the North Carolina General Assembly has found, determined and declared that controlled access highways are necessary for the health and welfare of the State of North Carolina and that the State of North Carolina when proceeding under this statute, North Carolina General Statutes 136-89.53, is acting within the police power. This holding is contrary to previous rulings of the court and therefore this statute with the construction placed thereon by the North Carolina court impairs the promise and obligation existing between the seller and the purchaser in a subdivision that all streets and ways shall be kept open. *Mulher* v. *New York,* 197 U. S. 544, 49 L. Ed. 872. See also *Saur* v. *New York,* 206 U. S. 536, 51 L. Ed. 1176. But by reason of the stipulation in this case, that petitioner had a private easement, the *Saur* case is not applicable.

Easements and contractual rights are property and the Fifth Amendment requires that property shall not be taken for public use without just compensation. *Perry* v. *United States,* 294 U. S. 330, 79 L. Ed. 912; *United States* v. *General Motors,* 323 U. S. 373, 89 L. Ed. 311. This constitutional requirement is made applicable to the

states by the Fourteenth Amendment. *Griggs* v. *Alleghany County,* 369 U. S. 84, 85, 7 L. Ed. 2d 585, 586; *Chicago B & Q Railroad* v. *Chicago,* 166 U. S. 226, 41 L. Ed. 979. Even though the constitutional protection invoked be denied by the state court on non-federal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. *Demorest* v. *Bank Co.* 321, U. S. 36, 42, 88 L. Ed. 526, 530; *Griggs* v. *Allegany County* 369 U. S. 84, 7 L. Ed. 2d 585; *Chicago B & Q Railroad Co.* v. *Chicago,* 166 U. S. 226, 41 L. Ed. 979.

For the reasons above stated the petitioners have been deprived of their property without compensation and respectfully request this court to hear and determine the questions herein presented.

CONCLUSION

This court should grant its writ of certiorari to the North Carolina Supreme Court, not only because petitioners have been deprived of a substantial property right without compensation, but because the issues presented in this case are tremendously important throughout the United States. All of the States and the Federal Government are now engaged in the construction of thousands of miles of limited access highways. Many of these highways necessarily cut through cities and towns, throughout the United States, resulting in the blocking of city streets and the creation

of *cul de sacs*. In many instances, private easements are involved. Therefore, the issues presented here should be clarified by this court to the end that the applicable principles of law shall be applied uniformly throughout the United States.

This case presents a question, the resolution of which will have immediate importance far beyond the particular facts and parties involved herein. It is respectfully requested that the court review this case in the interest of justice and to the end that trial and appellate litigation in both the Federal and State courts involving similar questions be resolved and eliminated.

Wherefore, your petitioners pray that a writ of certiorari to the North Carolina Supreme Court be granted by this Honorable Court and that the decision of the North Carolina Court be reviewed as by law provided.

This 4th day of May, 1965.

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APPENDIX I

SUPREME COURT OF NORTH CAROLINA
SPRING TERM 1965

No. 448—Forsyth

PAUL WOFFORD and wife,
LUCILLE PASCHAL WOFFORD,
FRED M. PARRISH and wife,
MARY ANNE PASCHAL PARRISH,
and HENSEL WOOD PRODUCTS,

v.

THE NORTH CAROLINA STATE
HIGHWAY COMMISSION.

Appeal by plaintiffs from Olive, E. J., August 31, 1964, Non-jury Session of Forsyth. Docketed and argued as No. 397 at the Fall Term, 1964.

Proceedings to recover damages for the alleged appropriation of property for highway purposes.

Individual plaintiffs own an 8.1-acre tract of land in the city of Winston-Salem, a portion of which they leased to corporate plaintiff. The property is in an industrial one, and corporate plaintiff operates a wood processing plant thereon. The land lies to the south of and abuts 21st Street, which intersects Ivy Avenue a short distance to the west of the property, and prior to May 1963 intersected Liberty Street about 200 feet to the east of the property. Prior to May 1963 "a large percentage of all traffic going to and from plaintiffs' property was by way of the Liberty Street intersection." Liberty Street is "one

ot the the main arteries of travel in the City of Winston-Salem," and prior to May 1963 "was the main street connecting 21st Street to the business and residential areas to the north, east and south of plaintiffs' property, and to the general system of streets and highways in the City of Winston-Salem." In May 1963 the defendant, State Highway Commission, began construction of highway project 8.17373, which is commonly called the North-South Expressway through the city of Winston-Salem, and is designated U.S. Highway 52. The Expressway crosses 21st Street between plaintiffs' property and Liberty Street. Defendant caused 21st Street to be "blocked, cut off and closed" from Liberty Street by a dirt fill made in the course of construction of the Expressway. Thus 21st Street is blocked and terminated about 100 feet east of plaintiffs' property, creating a *cul-de-sac*. The closest access from plaintiffs' property to Liberty Street is now by way of 21st Street, Ivy Avenue and 25th Street. The intersection of 25th and Liberty Streets is four blocks north of 21st Street."

Plaintiffs allege and contend they had "a public and private" easement in 21st Street in both directions, the blocking of 21st Street has damaged their property and amounts to a taking without compensation. Defendant avers and contends that plaintiffs have suffered no compensable damage.

The facts, as above summarized, were stipulated. The trial court ruled that the blocking of 21st Street did not constitute an appropriation of plaintiffs' property or an interest in plaintiffs' property, and that plaintiffs suffered no compensable damage. Judgment was entered dismissing the proceedings.

Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney Rosser and Spry, Hamrick and Doughton for the State Highway Commission.

Deal, Hutchins and Minor and Edwin T. Pullen for plaintiffs.

Moore, J. The question is whether the closing of 21st Street about 100 feet east of plaintiffs' property, so as to leave it on a *cul-de-sac,* constitutes an appropriation of a property right of plaintiffs for which they are entitled to compensation from the State.

The same legal question, on similar facts, arose in Hiatt v. Greensboro, 201 NC 515, 160 SE 748 (1931). In holding that the property owner had suffered compensable damage this Court said: "He has an easement in the street, which is appurtenant to his lot. This easement is his private property of which he cannot be deprived even for the use of the public, without just compensation. . . . 'An abutting owner has two distinct kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; and this regardless of whether the fee of the highway is in him or not. These rights are property of which he may not be deprived without his consent, except upon full compensation and by due process of law. They include . . . the right to have the highway kept open as a thoroughfare to the whole community for the purpose of travel . . .' 29 C.J. p., 547." Further: "The plaintiffs in the instant case have suffered special damages in the depreciation of the value of their property resulting from the deprivation of their right of

access to their property from the northern section of the city and from the stopping of all travel by their property from the southern section of the city. They have been deprived of rights which differ in kind and degree from the rights of the public." This decision, at the time of its rendition, was in accord with the weight of authority in other jurisdictions. 49 A.L.R. 351; 93 A.L.R. 642.

The *cul-de-sac* principle was again presented to this Court, this time involving rural property, in Snow v. Highway Commission, 262 NC 169, 136 SE 2d 678 (1964). There it was held that the damages were not compensable. The rationale of that decision is fully set out in the opinion and a detailed repetition here would only over-burden the Reports. We are paraphrasing the opinion as follows: To entitle the landowner to damages, he must show that land has been taken or physically damaged, or that some easement or right appurtenant to the land has been taken or interfered with. The landowner has an easement consisting of the right of reasonable access to the particular highway on which his land abuts. He has no constitutional right to have anyone pass by his premises at all; highways are built and maintained for public necessity, convenience and safety in travel and not for the enhancement of property along the route. An abutting landowner is not entitled to compensation because of circuity of travel to and from his property; such inconvenience is held to be no different in kind, but merely in degree, from that sustained by the general public, and is *damnum absque injuria.* When the Highway Commission acts in the interest of public safety, convenience and general welfare, in designating highways as controlled-access highways, its action is the exercise of the police power of the State; the impairment of the value of property by the exercise of police power, where property

itself is not taken, does not entitle the owner to compensation. (See the opinion in Snow for citation of authorities.)

The *cul-de-sac* principle (followed in Hiatt) has been generally limited to property abutting the streets in cities and towns. Snow v. Highway Commission, *supra*. The different treatment accorded owners of rural property abutting a road and the owner of urban property abutting a street has been held to be unsound in well-reasoned recent opinions. Tift County v. Smith, 131 SE 2d 527 (Ca. 1963); State v. Silva, 378 P. 2d 595 (N.M. 1963); Warren v. State Highway Commission, 93 NW 2d 60 (Iowa 1958); Department of Highways v. Jackson, 302 SW 2d 373 (Ky. 1957). Weighing the factors in the light of modern conditions, there is no reason to distinguish between rural and urban property on the question under consideration.

As stated in Hiatt, the owner of land abutting a street has two distinct rights, (1) a public right which he enjoys in common with all other citizens, and (2) a private right which arises from his ownership of property contiguous to a street. All citizens have right to the free use of a street or public way subject to the rules, regulations, restrictions and limitations promulgated pursuant to the police power of the State; this right the owner of land abutting the street or public way has in common with the public. Where a *cul-de-sac* is created, or the movement of traffic has been limited to one direction, the landowner's right to use the street is no more restricted than is that of other citizens making use thereof, and the landowner has no constitutional right to have others pass his premises. Barnes v. Highway Commission, 257 NC 507, 126 SE 2d 732. The restriction upon the landowner and the restriction upon the public generally in the use of the street for travel,

is no different in kind, but merely in degree. A property owner is not entitled to compensation for mere circuity of travel. Absolute equality of convenience cannot be achieved, and those who purchase and occupy property in the proximity of public roads or streets do so with notice that they may be changed as demanded by the public interest. Snow v. Highway Commission, *supra;* Moses v. Highway Commission, 261 NC 316, 134 SE 2d 619; Barnes v. Highway Commission, *supra;* Sanders v. Smithfield, 221 NC 166, 19 SE 2d 630; Mosteller v. R. R., 220 NC 275, 17 SE 2d 133. The private right of the owner of land abutting a street or highway is an easement appurtenant to the land, consisting of the right of reasonable access to the particular street or highway which his property abuts. Snow v. Highway Commission, *supra;* Moses v. Highway Commission, *supra;* Abdalla v. Highway Commission, 261 NC 114, 134 SE 2d 81; Hedrick v. Graham, 256 NC 249, 96 SE 2d 129. In the instant case, no part of plaintiffs' land was taken or physically injured. Their right of reasonable access to 21st Street has not been appropriated, limited or interfered with.

In final analysis, plaintiffs seek to recover damages for the alleged impairment of the value of their property resulting from the obstruction of 21st Street 100 feet to the east of the property. Such damage is not compensable. The General Assembly has found, determined and declared that controlled-access highways are necessary for the preservation of the public peace, health and safety, the promotion of the general welfare, the improvement and development of transportation facilities in the state, the elimination of hazards at grade intersections, and other related purposes. G. S. 136-89.53. When the Highway Commission acts in the interest of public safety, convenience and gen-

eral welfare, in designating highways as controlled-access highways, its action is the exercise of the police power of the State. And the impairment of the value of property by the exercise of police power, where property itself is not taken, does not entitle the owner to compensation. Barnes v. Highway Commission, *supra;* Nick v. State Highway Commission, 109 NW 2d 71 (Wis. 1961). If plaintiffs were permitted to recover for impairment of property value, because of the circuity of travel thereto and therefrom and the dwindling of traffic by their property, resulting from the street obstruction, practically every property owner in a town could recover for the same reasons when the Highway Commission constructs a by-pass to expedite traffic. Moses v. Highway Commission, *supra.*

Where the State has authorized the construction of a barricade across a street, thereby closing it to vehicular traffic in one direction, the owner of land abutting the street on the *cul-de-sac* thus created has not been deprived of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, though the value of his property has been impaired and the State has not compensated him for such loss of value Meyer v. Richmond, 172 US 82. In North Carolina such action by the State, in the exercise of its police power, does not violate Article I, section 17, of the State Constitution. Barnes v. Highway Commission, *supra.* ". . . such questions must be for the final determination of the state court. It has authority to declare that the abutting land owner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement." Sauer v. City of New York, 206 US 536.

Hiatt v. Greensboro, *supra,* is expressly overruled insofar as it is in conflict with this opinion.

Plaintiffs contend that the instant case includes and effects a property right not involved in Hiatt. It is asserted, and defendant does not deny, that plaintiffs' land and 21st Street, from the Ivy Avenue intersection to the Liberty Street intersection, are parts of a tract of land which was subdivided by the owner into streets and lots, a map of the subdivision was made and recorded, lots (including plaintiffs') were sold with respect to the map, and 21st Street is shown in the map. Though the record is not clear and specific as to such subdivision, we accept the assertion as true for the purposes of the appeal. Our inquiry is whether the fact that plaintiffs' land originated in a subdivision gives its owners a superior right of easement in the streets and thereby distinguishes it from lots having a different origin, so far as the State and its agencies are concerned.

As a general proposition, where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to public use, and the purchaser of the lot or lots acquires the right to have all and each of the streets kept open. Steadman v. Pinetops, 251 NC 509, 112 SE 2d 102; Blowing Rock v. Gregorie, 243 NC 364, 90 SE 2d 898; Foster v. Atwater, 226 NC 472, 38 SE 2d 316; Conrad v. Land Company, 126 NC 776, 36 SE 282. The right of a purchaser with respect to the streets of the subdivision is in the nature of an easement appurtenant to his lot. Realty Company v. Hobbs, 261 NC 414, 135 SE 2d 30. This right of easement is not absolute; it extends only to streets or portions of streets of the sub-

division necessary to afford convenient ingress or egress to the lot of the purchaser. Under certain circumstances the seller-dedicator or other lot owners may abandon and close a street or a portion of a street. As to the purchaser, opposing such closing, the question is whether the street is reasonably necessary for the use of his lot. G. S. 136-96; Janicki v. Lorek, 255 NC. 53, 120 SE 2d 413; Hine v. Blumental, 239 NC 537, 80 SE 2d 458; Rowe v. Durham, 235 NC 158, 69 SE 2d 171; Russell v. Coggin, 232 NC 674, 62 SE 2d 70; Sheets v. Walsh, 217 NC 32, 6 SE 2d 817.

The streets of a subdivision are not dedicated to the public merely by reason of the subdivision of the land the recordation of a map thereof. This is only an offer to dedicate; dedication to the public is complete only when the offer is accepted by the responsible public authority, and neither the burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to accept and assume them. Owens v. Elliott, 258 NC 314, 128 SE 2d 583; Steadman v. Pinetops, *supra;* Lee v. Walker, 234 NC 687, 68 SE 2d 664. The offer to the public may be revoked at any time before acceptance; but this does not affect the rights of a lot owner as against the seller-dedicator and other lot owners. Janicki v. Lorek, *supra;* Rowe v. Durham, *supra;* Irwin v. Charlotte, 193 NC 109, 136 SE 368. A city or town may in its discretion accept or reject an offer of dedication; it has the right to determine where its streets shall be located. Steadman v. Pinetops, *supra;* Lee v. Walker, *supra.* It may accept a part of a street and determine the width of the street, and the width need not conform to the offer of dedication. Sugg

v. Greenville, 169 NC 606, 86 SE 695. The duty of a city or town to the owner of a lot in a subdivision is not the same as that of the seller-dedicator and his assigns.

With respect to the rights of the owner of a lot abutting a street, as against the city, the fact that the lot is one of a subdivision rather than of some other origin is, so far as the instant case is concerned, a distinction without a difference. Whether a street lies in a subdivision or is of other origin, the city may close all or part of it upon compliance with statutory procedure. G. S. 153-9(17); G.S. 160-200(11). Of course the closing must not deprive a property owner of reasonable ingress or egress. See Blowing Rock v. Gregorie, *supra*. An individual may restrain the wrongful obstruction of a public way, of whatever origin, if he will suffer injury thereby as distinct from the inconvenience to the public generally, and he may recover such special damages as he has sustained by reason of the obstruction. Owens v. Elliott, 257 NC 250, 125 SE 2d 589; Scott v. Shackelford, 241 NC 738, 86 SE 2d 453. The purchaser of a lot abutting a public street, whatever the origin of the street, takes title subject to the authority of the city to control and limit its use, and to abandon or close it under lawful procedure. Re Joiner Street, 164 NYS 272, involved the question of special property right by reason of ownership of a lot abutting a street of a subdivision. The Court made inquiry and response as follows: ". . . Does such dedication of the spaces designated as streets give the owners of such lots, after the spaces become streets of a municipality by acceptance of the public authorities, any special privileges not possessed by owners of lots situated on streets otherwise acquired? We think not. Such spaces so designated as streets and so dedicated, when accepted

by the public authorities, become streets under the charter of the municipality, and subject to all its provisions. If the fee to the space in the front of the lots is conveyed to the owners of the lots, in case of the abandonment of such a street by the municipal authorities, the land in such space would belong to the owners of the lots. Aside from such rights possessed by the owners of the lots, we see no validity in any claim put forward by them to peculiar private rights, differing in any respect from the rights possessed by abutting owners upon streets having a different origin."

The General Assembly has conferred upon the State Highway Commission the authority and duty to establish, construct and maintain "controlled-access Facilities" (G.S. 136-89.48 to G.S. 136-89.58) in both rural and urban areas, and has authorized the Commission and the governing bodies of cities and towns to enter into agreements with each other respecting the financing, planning, establishment, maintenance and use of controlled-access facilities or other public ways in their respective jurisdictions, G.S. 136-89.54. There is no suggestion that the statute was not fully complied with in regard to the North-South Expressway in Winston-Salem. In the establishment, construction and maintenance of that controlled-access facility, the Commission and the City of Winston-Salem, as agencies of the State, were exercising the police power of the State.

For the reasons hereinbefore set out we hold that plaintiffs have suffered no compensable damage.

Affirmed.

Parker, J., dissenting. The majority opinion at its beginning states the question for decision, and then says: "The same legal question, on similar facts, arose in Hiatt v. Greensboro, 201 N. C. 515, 160 S. E. 748 (1931)." After quoting *in extenso* from the opinion in the Hiatt case, the majority opinion states: "This decision, at the time of its rendition, was in accord with the weight of authority in other jurisdictions. 49 A.L.R. 351; 93 A.L.R. 642."

This is stated in 29A C.J.S., Eminent Domain (1965), § 105(1):

> "An easement or servitude, whether in the nature of a right of way, a restrictive covenant, or a negative or equitable easement, is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured.
>
> "Thus the owner of land abutting on a street or highway has a private right in such street or highway, distinct from that of the public, which cannot be taken nor materially interfered with without just compensation, and this is so, even though another owns the fee in the highway."

The statement of the law is supported by the citation of a legion of cases from many jurisdictions in this country; included among the North Carolina cases cited is the Hiatt case; and it still seems to be the majority rule in this country. To the same effect, see Nichols on Eminent Domain, 3d ed., Vol. 2, pp. 117-118 (1963), which cites

many cases from many jurisdictions, including several cases from North Carolina, and among them the Hiatt case. See also to the same effect Anno., 150 A.L.R. 644 (1944). To deny compensation to plaintiff in this case, this Court has to overrule the Hiatt case, and to approve the taking of a property right of plaintiffs without requiring the payment of just compensation, in violation of Article I, section 17, of the North Carolina Constitution, and in violation of the 14th Amendment to the United States Constitution. The majority opinion also gravely impairs, if it does not in effect overrule, Davis v. Alexander, 202 N. C. 130, 162 S. E. 372; Long v. Melton 218 N. C. 94, 10 S. E. 2d 699. I think the Hiatt case is sound law, is in accord with the general rule in a majority of the jurisdictions, and I do not agree to overruling it. I vote to reverse the judgment below.

APPENDIX II

IN THE SUPERIOR COURT
NORTH CAROLINA
FORSYTH COUNTY

PAUL H. WOFFORD and wife, LUCILLE PASCHAL WOFFORD, FRED M. PARRISH and wife, MARY ANNE PASCHAL PARRISH, HENSEL WOOD PRODUCTS,
Plaintiffs

vs.

STATE HIGHWAY COMMISSION,
Defendant

JUDGMENT

This cause coming on to be heard and being heard before The Honorable Hubert E. Olive, Judge of the Superior Court presiding at the August 31, 1964 nonjury civil term of the Forsyth County Superior Court, upon motion of the plaintiffs and defendant for determination of the issues, other than damages, raised by the pleadings, and it appearing to the Court that this action was commenced by the plaintiffs against the defendant by the issuance of summons and filing of a complaint on the 18 day of December, 1963; that summons, together with a copy of the complaint was duly served on the defendant within the time allowed by law, and that the defendant filed an answer within the time allowed by law; that the plaintiff, Paul Wofford and wife, Lucille Paschal Wofford, Fred M. Parrish and wife, Mary Anne Paschal Parrish, and Hensel Wood Products, were the only persons who had or claimed to have an interest in the property described in the complaint on the date of issuance of summons and filing of the complaint against the defendant, except such interest as the County of Forsyth and the City of Winston-Salem had or may have had by reason of ad valorem taxes.

That all persons who are necessary or proper parties to this action are duly before the Court, and that the Court by stipulation of counsel for the plaintiffs and defendant makes the following finding of fact:

It was stipulated and agreed in open Court by counsel for both parties that Mr. George Kempton, expert realtor, had appraised the premises and that if he had been in Court he would have testified as an expert witness for the plaintiffs that the plaintiffs had suffered substantial monetary

damages by reason of the actions of the defendant in blocking access from Twenty-first Street into Liberty Street approximately 100 feet north of plaintiffs' property by reason of the construction of State Highway Project 8.-17378, Forsyth County. For the purposes of this hearing only, the parties stipulated that the Court might consider this testimony as true.

FINDING OF FACT

1. Plaintiffs Fred M. Parrish and Mary Anne Paschal Parrish are citizens and residents of Forsyth County, North Carolina. Plaintiffs Paul H. Wofford and wife, Lucille Paschal Wofford, are citizens and residents of Alamance County, North Carolina. Plaintiff, Hensel Wood Products, is a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina.

2. The defendant, North Carolina State Highway Commission, is an agency of the State of North Carolina, empowered by law to construct highways and to acquire land for such purposes, including limited access highways and to open and close public streets.

3. Plaintiffs, Mary Anne Paschal Parrish and Lucille Paschal Wofford, are owners of certain lands located on Twenty-First Street in the City of Winston-Salem, and improvements thereon, more particularly described as follows:

> BEGINNING at an iron stake at the east side of Ivy Avenue, said stake also being in the south line of the right-of-way of the Southern Railway and 206.2 feet

in a southerly direction from the south side of 21st Street, and running thence with south line of Southern Railway right-of-way as it curves northeastwardly 309.5 feet to a stake in the south side of 21st Street; thence with south side of 21st Street south 87 degrees, 28 minutes east 772.6 feet to an iron stake in the west line of the right-of-way of Norfolk & Western Railway Company; thence with the west line of their right-of-way south 14 degrees, 05 minutes west 416.9 feet to an iron stake; thence north 88 degrees 00 minutes west 855 feet to an iron stake in the east side of Ivy Avenue; thence with east side of Ivy Avenue it curves northwestwardly 225 feet, the place of BEGINNING and containing 8.1 acres.

4. Plaintiff, Hensel Wood Products, is now occupying a portion of said property under and by virtue of the lease with the owners of said property.

5. Plaintiffs' property is located and abuts on the south side of Twenty-first Street between the intersection of Ivy Avenue and Twenty-first Street on the west, and the intersection of Twenty-first Street and Liberty Street on the east. Twenty-first Street is a public street and is the only means of ingress and egress to and from plaintiffs' property, except to the extent that access to said property is available from Ivy Avenue on the south. The plaintiffs' lands and the entire area are devoted to and adaptable to industrial and business uses.

6. The above-described property is zoned Industrial, and the land and building contained thereon are at present used as a wood conversion and reprocessing plant. The

building is located approximately 200 feet from the former intersection of Twenty-first Street and Liberty Street.

7. Prior to the construction of Highway Project No. 8.-17378 by defendant, Liberty Street was and still is one of the main arteries of traffic in the City of Winston-Salem and as such was the main street connecting Twenty-first Street to the business and residential areas to the north, east and south of plaintiffs' property, and to the general system of streets and highways in the City of Winston-Salem. Plaintiffs' as the owner of the lands described above abutting on Twenty-first Street, had and still have both public and private easements of ingress and egress to Twenty-first Street, in both directions; and had access to Liberty Street via Twenty-first Street. Access to Liberty Street has now been terminated by State Highway Commission Project No. 8.17378, Forsyth County, as hereinafter set forth.

8. On or about May 1, 1963, the defendant began construction of Highway Project 8.17378, which is commonly called the North-South Expressway through the City of Winston-Salem, and which is part of the North Carolina Highway System and is particularly designated as U. S. Highway #52. The right-of-way of the new North-South Expressway crosses Twenty-first Street between plaintiffs' property and the former intersection of Liberty Street and Twenty-first Street. By reason of the construction of the North-South Expressway, the defendant has caused Twenty-first Street to be blocked, cut off and closed from Liberty Street by reason of a dirt fill of approximately ten feet in height, made in order to construct a portion of the North-South Expressway. This fill completely blocks Twenty-first Street approximately 100 feet north of plaintiffs' property. Defendant has in effect closed Twenty-

first Street as a public street, so that Twenty-first Street terminates about 100 feet to the east of plaintiffs' property. As a result of the closing of Twenty-first Street and construction of the above project, defendant had created a cul-de-sac by completely blocking, closing and dead-ending Twenty-first Street at the intersection of Liberty Street.

9. Prior to the defendant's construction of the fill blocking access from Twenty-first Street into Liberty Street, a large percentage of all traffic going to and from plaintiffs' property was by way of the Liberty Street intersection.

10. Plaintiffs' closest point of access to Liberty Street is now via Twenty-first Street, Ivy Avenue and Twenty-fifth Street, said Twenty-fifth Street having direct access to North Liberty Street four blocks north of Twenty-first Street.

CONCLUSION OF LAW

The Court, based on the above Findings of Fact, makes the following Conclusion of Law:

1. That the actions of the defendant complained of in this action did not constitute an appropriation of plaintiffs' property or an interest in plaintiff's property.

2. That the plaintiffs suffered no damages by reason of the actions of the defendant which are compensable at law.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the plaintiffs' action be dismissed, and that

the costs of the action be taxed by the Clerk against the plaintiffs.

This the 3rd day of September, 1964.

/s/ Hubert E. Olive
Hubert E. Olive, Judge Presiding

APPENDIX III

North Carolina General Statutes 153-9 (17)

"The boards of commissioners of the several counties likewise have power to close any street or road or portion thereof (except those lying within the limits of municipalities) that is now or may hereafter be opened or dedicated, either by recording of a subdivision plat or otherwise. Any individuals owning property adjoining said street or road who do not join in the request for the closing of said street or road shall be notified by registered letter of the time and place of the meeting of the commissioners at which the closing of said street or road is to be acted upon. Notice of said meeting shall likewise be published once a week for four weeks in some newspaper published in the county, or if no newspaper is so published, by posting a notice for thirty days at the courthouse door and three other public places in the county. No further notice shall be necessary: Provided, that if the street or road has previously been accepted by the State Highway Commission for maintenance, the State Highway Commission shall be likewise notified of said meeting by registered letter. If it appears to

the satisfaction of the commissioners that the closing of said road is not contrary to the public interest and that no individual owning property in the vicinity of said street or road or in the subdivision in which is located said street or road will thereby be deprived of reasonable means of ingress and egress to his property, the board of commissioners may order the closing of said street or road; provided, that any person aggrieved may appeal within thirty days from the order of the commissioners to the superior court of the county, where the same shall be heard de novo. Upon such an appeal, the superior court shall have full jurisdiction to try said matter upon the issues arising and to order said street or road closed upon proper findings of fact by the jury. A certified copy of said order of the commissioners (or of the judgment of the superior court in the event of an appeal) shall be filed in the office of the register of deeds of said county. Upon the closing of a street or road in accordance with the provisions hereof, all rights, title and interest in such portion of such street or road shall be conclusively presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to such portion of such street or road, and the title of each of such persons, firms or corporations shall, for the width of the abutting land owned by such persons, firms or corporations, extend to the center of such street or road.

"The board of aldermen or other governing body of any municipality shall have the same power and authority with respect to roads, streets or other public ways which are inside the corporate limits of such

municipality as given to the county commissioners by the second paragraph of this subdivision with respect to roads, streets or public ways outside the corporate limits of a municipality.

"Copies of the registered letters giving the notice required by the second paragraph of this subdivision, and the return receipts or other good and sufficient evidence of giving the required notice, shall be recorded in the register of deeds office, together with the resolution of such county or municipal governing body (or with the judgment of the superior court, in cases where an appeal was taken).